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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES AND THE CITY OF GALVESTON, TEXAS, *Petitioners,*

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the Board of Trustees of Galveston Wharves and the City of Galveston, Texas, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case on August 8, 1968.

CITATIONS TO OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Texas, rendered September 11, 1964, is unreported and is reprinted herein as Appendix B. The first opinion of the Fifth Circuit Court of Appeals, dated September 14, 1965, appears at 351 F.2d 183 and is reprinted as Appendix

C, *infra*. The second opinion of the District Court, dated June 20, 1966, is unreported and is reprinted as Appendix D, *infra*. The second opinion of the Fifth Circuit rendered November 16, 1966, appears at 368 F.2d 412 and is reprinted herein as Appendix E. The third and fourth opinions of the District Court (the latter upon reconsideration), dated March 20, 1967, and May 3, 1967, respectively, are unreported and are reprinted herein as Appendices F and G. The third and final opinion of the Fifth Circuit, dated August 8, 1968, appears at 400 F.2d 320 and is reprinted as Appendix H, *infra*.

JURISDICTION

The opinion of the Fifth Circuit was rendered on August 8, 1968. On August 21, 1968, petitioners filed a timely petition for rehearing in the Fifth Circuit. The petition was denied on March 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 2(7) and 6 of the Railway Labor Act, 45 U.S.C.A. §§ 152, seventh, and 156; and 28 U.S.C. § 2283, are set forth in Appendix A, *infra*.

QUESTIONS PRESENTED

1. A labor dispute arose between a union and an employer (the City of Galveston, Texas) over the layoff of employees as the result of a lease of the employer's facilities. The employer obtained a state court injunction prohibiting the union from inducing city employees to engage in work stoppages. The question is whether in the face of 28 U.S.C. § 2283 a Federal District Court, prior to the completion of the bargaining process ordered by the court, may enjoin the use of the

state court injunction on the theory that the union's right to strike is implicit in the District Court's order and necessary to "effectuate" that order.

2. The employer laid off its employees pursuant to a provision in its Agreement with the union relating to layoffs and also under a management prerogative clause in the Agreement. The question is whether the Court of Appeals may designate the dispute as a "major" one and award backpay to the employees without prior recourse to any administrative agency, including the Railroad Adjustment Board or a system board of adjustment specifically designated by statute for the awarding of backpay.

STATEMENT

Petitioner, Galveston Wharves ("Galveston"), is an adjunct of the City of Galveston, Texas. It is the owner and operator of dock facilities at the Port of Galveston. As to some of its activities, it is deemed a common carrier by rail under the Interstate Commerce Act. Prior to August 1964, one of these facilities was Elevator B, a shipside public grain elevator which for several years had been losing money.[1]

On October 1, 1960, a collective bargaining Agreement became effective between Galveston and the respondent union ("SIU"), which had been certified as the collective bargaining agent for all grain elevator workers employed by Galveston at Elevator B. By stipulation, the parties in 1963 extended the Agreement for a one-year period through September 30, 1964.

On July 7, 1964, following several weeks of widespread publicity in the city's newspapers, Galveston leased its previously unprofitable operations at

[1] *United Industrial Workers*, 170 N.L.R.B. No. 158 (April 12, 1968). The Board's opinion is reprinted as Appendix I, *infra*.

Elevator B to the Port Richmond Elevator Company, to become effective on August 1, 1964. Despite this, on July 20, 1964, SIU served notice that it wished to reopen negotiations on the Agreement.

Galveston had entered into the lease in conformity with two provisions in the Agreement:

(a) Article XVI of the Agreement provided that "Seven calendar days' notice must be given employees that are to be laid off with notice also being given to the Union." On July 23, 1964, nine days prior to the effective date of the lease, Galveston gave its employees and SIU the formal notice required by this clause.

(b) Article XII of the Agreement granted Galveston broad management rights. Thus, it preserved to Galveston "the management of the Elevator and the direction of the working force, including, but not limited to the right to hire, suspend or discharge for good cause, to assign the jobs to transfer employees within the Elevator, to increase and decrease the working force, to determine the products to be handled, the schedules of operation and the methods, procedures, means of handling."[2]

When Port Richmond took over the properties on August 1, it advertised in the local newspaper asking former employees of Galveston to apply for employment. The parties to a subsequent NLRB proceeding stipulated that all employees in the SIU unit (some 40 or so) then received letters from Port Richmond stating that its employment policy was to accept applications "from all prospective employees, including, of

[2] These contract provisions, in turn, were permissible under § 2, par. 7 of the Railway Labor Act, 45 U.S.C.A. § 152, seventh, which allows changes in working conditions in the manner prescribed in collective bargaining agreements.

course, those formerly employed by the Galveston Wharves." Applications were made available at the Elevator. The NLRB found: "It is undisputed that only one of the total SIU complement filed an application and he was hired." *United Industrial Workers, supra* n. 1.

Although Galveston had acted in full compliance with its labor Agreement, and Port Richmond had assumed control of Elevator B, SIU on July 29 served on Galveston what it claimed was a "section 6" notice requesting negotiation of all matters affecting wages, hours and working conditions covered by the existing contract. It also proposed a clause in any future contract relating to shut-down, leasing or sub-contracting. Several meetings between Galveston and SIU followed, at which it was agreed to arbitrate the grievance as to the men laid off. Even though each party designated its representatives to the System Board of Adjustment, SIU, as the Fifth Circuit noted, "has taken no steps since to prosecute or process the Adjustment Board hearing" (351 F.2d at 186 n. 12). Instead, on July 31, SIU began picketing the entire Galveston Wharves premises.[3] On the same day, it brought this action under the Railway Labor Act against Galveston and Port Richmond (since dismissed as to the lessee). It sought an injunction against consummation of the lease or any operation under it pending exhaustion of the Railway Labor Act machinery, and also restoration of the prior status quo. It alleged that Galveston should have given thirty days' notice of its layoff under § 6 of the Railway Labor Act, which provides for such notice "of an intended change *in agreements*

[3] The picketing was limited to the Elevator B area after Galveston obtained a temporary restraining order from a state court.

affecting rates of pay, rules, or working conditions * * *" (45 U.S.C.A. § 156; emphasis added).

The District Court denied a temporary restraining order and, after a hearing on affidavits and documents, denied a preliminary injunction. App. B. The District Court specifically held: "The Court classified this controversy as a minor dispute due to the fact that the resolution of the issues involved will depend upon the interpretation of an existing agreement," and relied upon a recent Fifth Circuit case which had so held. *St. Louis, S.F. & T. Ry.* v. *Railroad Yardmasters,* 328 F.2d 749 (1964).

On appeal, the Fifth Circuit conceded that the lease had been "non-discriminatorily motivated" (351 F.2d at 184; App. C). Nevertheless, it held that the Agreement, even by "reasonable implication," did not afford "some arguable basis" for what Galveston had done (*id.* at 188); that Galveston "terminated the contract by going out of business" (*id.* at 189);[4] that there had

[4] The court's inconsistency and confusion are illustrated by its treatment of this point.

In arguing that what petitioner did could not possibly be called a "layoff", the Court said that during the term of the contract, petitioner "terminated the contract by going out of business. * * * Nothing in this record even remotely suggests that this was a temporary layoff * * *. This was it—final, positive, all washed up" (*id.* at 189). Yet at another point in the same opinion the court stated that petitioner "has made a lease of limited duration" (*id.* at 187) and that petitioner "did not go out of business. Its lease, as leases of large industrial properties go, is short termed indeed" (*id.* at 191).

As pointed out below, the union itself has repeatedly referred to the treatment of these employees as a "layoff" or "laying off." And in one brief it told the court: "* * * Appellees [Galveston] refer to the lease as 'long-term.' But this is a euphemism—since the record is clear that it was a five-year lease" (Brief before the Fifth Circuit dated November 18, 1965, p. 7).

thus been "an intended change *in agreements* affecting rates of pay rules, or working conditions" under the Act (emphasis added), and that the Railroad Adjustment Board therefore had no jurisdiction. Galveston, said the court, should have given thirty days' notice under § 6 of the Act. Since it had "so clearly violated" the employees' rights, "some suitable relief and sanction should be imposed so that bargaining about this operational termination" could go forward (*id.* at 191-192). The case was remanded.[5]

Judge Bell dissented from that part of the opinion which related to Galveston. Stating that he had "looked in vain for some foundation for the [majority's] holding," he concluded:

> The dispute necessarily turns on a construction of these provisions [in the Agreement] to determine whether the carrier acted within its rights. This is a classic example of a minor dispute which under the law is to be handled by the Railway Adjustment Board [351 F.2d at 192.[6]]

In the meantime, Galveston had sought and obtained from the District Court of Galveston County, Texas, an injunction which prohibited SIU members from picketing. The original basis for the injunction was

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[5] SIU twice filed unfair labor practice charges against Port Richmond, and both times they were dismissed. However, when Port Richmond filed charges against SIU, the NLRB took jurisdiction and obtained an injunction against SIU picketing of Port Richmond.

[6] Additionally, he pointed out that even if this were a major dispute, § 6 of the Act might well be inapplicable if the cessation of the elevator business had been bona fide. He added, as the majority had conceded, that "There is not a whisper in the record of the elevator having been leased because of anti-union animus" (351 F.2d at 193).

the "no strike" provision in the contract, which prohibited strikes or picketing during the life of the contract. Later an amended petition was filed in the State Court which changed the basis of the injunction to Art. 5154C of the Texas Revised Civil Statutes, which makes illegal any picketing designed to induce city employees to engage in work stoppages.

On remand from the Fifth Circuit, the Federal District Court ordered the parties to bargain in good faith. It refused, on the grounds of hardship, to return the parties to their pre-lease status, it denied an SIU request for backpay, and it refused to modify the injunctions against picketing it had issued against SIU at the behest of the NLRB (see n. 5, *supra*). App. D. On Appeal for the second time the Court of Appeals approved the refusal to modify the injunctions, but it remanded the case for the imposition of "some suitable relief and sanction" that would have the effect of restoring the status quo prior to the lease. 368 F.2d 412; App. E.

On several occasions thereafter the parties informed the District Court that they were negotiating a settlement of their differences. Then, as the District Court later found, the settlement negotiations were broken off by SIU, which filed a petition for interim relief and sanctions. The District Court at first granted backpay and denied SIU's request to enjoin Galveston's use of its state court injunction. App. F. On reconsideration, however, the court reversed itself, ordered reinstatement of the laid off employees, but denied the union's claim for backpay on the ground that only the Railway Adjustment Board could grant such relief. At the same time, the court enjoined

Galveston from using the injunction it had obtained from the state court. It did so on the ground that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* was applicable to this case. App. G.

In its prior opinion, the Court of Appeals had stated that "We do not blueprint these matters. They are best left to the discretion of the District Judge" (351 F.2d at 192). Despite this statement, the appellate court now reversed the District Judge's discretionary decision and ordered the award of backpay. It did so even though SIU's original complaint had not even sought backpay, SIU had not cited a single case or a single statutory provision supporting such an award,[7] and the court itself conceded that "no case has been found where a federal court has awarded backpay as part of its enforcement of the status quo in a major dispute." 400 F.2d at 327; App. H.

The Court of Appeals also approved the enjoinder of any use by Galveston of the injunction it had obtained from the Texas court. It disavowed the reasoning of the District Court, pointing out that Galveston is a sovereign arm of the State of Texas and therefore immune from the Norris-LaGuardia Act. The court instead approved the federal injunction on the ground that the union's right to strike was "implicit" in the court's order, and the injunction was thus necessary "to carry out" or effectuate the District Court's bargaining order.

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[7] In fact, SIU conceded: "Similarly, it is true we are unable to find a case in which a Court has ordered payment of backpay against a carrier for breach of statute" (Brief before the Fifth Circuit dated November 1967, p. 3).

REASONS FOR GRANTING THE WRIT

A. The Injunction Against State Action Violates the Controlling Federal Statute and Conflicts With Decisions of This Court and Other Circuits.

The decision below—that under the circumstances of this case a federal court can enjoin Galveston from giving effect to a state court injunction against picketing—violates § 2283 of the Judicial Code, conflicts with decisions in other circuits as well as in the Fifth Circuit itself, and contravenes the holdings of this Court.

The Court of Appeals recognized that 28 U.S.C. § 2283 defines the limited area in which it can act. That section provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This language embodies a clear congressional mandate that, absent the specific exceptions noted in the section, the federal courts do not have power to enjoin proceedings in state courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8-9 (1939).[8]

The Court of Appeals conceded that no Act of Congress authorized its injunction,[9] and that no injunction

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[8] This case dealt with the predecessor § 265, but the Court's comments are equally applicable under the later section.

[9] The section requires that a statutory exception be "expressly" authorized. The former restriction, which applied only to actions under the federal bankruptcy laws, was generalized to cover such other exceptions as Congress might wish to make by specific statutory enactment. See Reviser's Note to § 2283. An example of a statutory exception in addition to the bankruptcy laws is the Interpleader Act, 28 U.S.C. § 2361.

was needed to aid federal court jurisdiction.[10] Nor did the court hold that an injunction was necessary "to protect" the court's judgment. Therefore, the sole issue is whether an injunction was necessary, within the meaning of the statute, to "effectuate" the court's judgment.

It is important to note briefly just how the Court of Appeals viewed the case in relation to this last exception for effectuation of a federal court judgment. The court reasoned as follows:

When the bargaining between the parties "has run its course," or if Galveston "continues to refuse to bargain," then the union would have a right to strike. And *if* it did strike, the strike would conflict with the state court injunction. Therefore, a federal injunction against use of the state court injunction is necessary to "effectuate the judgment" of the District Court, whatever that judgment may eventually turn out to be.

We submit that this is a far cry from any possible situation Congress had in mind when it narrowly defined the areas of conflict which would permit the extraordinary federal enjoinder of state action. Whatever judgment of the District Court ultimately evolves, it certainly will not be an *order* to strike. The fact is, as even the Court of Appeals seems to concede in parts of its opinion, that the union cannot strike now, regardless of whether this is a major or a minor dispute.

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[10] The extremely limited nature of the exclusion represented by this second exception is made clear by the Reviser's Note following § 2283:

> The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The law prohibits such a strike during the bargaining period.[11] Even under the Court of Appeals ruling, the District Court will only order that the parties bargain and that appropriate "sanctions" be imposed. No one knows when the bargaining will "run its course"—in this case or in any other labor case to which the decision below will equally apply. Sometimes weeks, months or even years pass before such bargaining and the litigation or arbitration emanating from it are finally resolved, as the union conceded in this very case.[12] As this Court pointed out in *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), "the procedures of the Act are purposely long and drawn out,

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[11] *Brotherhood of Locomotive Eng.* v. *Missouri-K-T R.R.*, 363 U.S. 528 (1960). The court below quoted the following language from *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 787 (S.D.N.Y. 1958):

> [W]hereas in the case of minor disputes strikes are illegal *per se* because the processes of the Act are final, binding and conclusive throughout and therefore can be enjoined . . . , in the case of a major dispute a strike is not illegal *per se* and cannot be enjoined *if the processes of the Railway Labor Act have been complied with and exhausted* [emphasis supplied].

Surely this language, quoted with approval, should have led the court to recognize that it was protecting a right to strike which did not exist. If this is a minor dispute, striking is illegal; if major, it is illegal until both parties have exhausted the administrative processes under the Act—not the case here.

[12] The Union told the Fifth Circuit in one of its early briefs:

> Complex issues involving the duty of the carrier to bargain, to require the lessee to assume its contract with Appellant, the "successor" doctrine, will be before the System Board, whose processes are already in motion. These matters before the Board will take many weeks, months, and, in view of the inevitable litigation that will ensue over any award that is rendered, even years. [Brief before the Fifth Circuit dated September 25, 1964, p. 18.]

based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."

The union, for any number of reasons, may well prefer not to strike. Thus, the strike referred to by the Court of Appeals is at most a contingency that may never occur,[13] and even if it does, it will occur at some indefinite future date.

The fact that state and federal law are in complete harmony at this stage of the proceedings is demonstrated by the NLRB order in *United Industrial Workers, supra* n. 1. There, the Board held that SIU violated § 8(b)(7)(c) of the NLRA, after Port Richmond took over the operation of Elevator B, by picketing with the purpose of forcing Port Richmond to bargain with the union. The Board ordered SIU to cease and desist such picketing.[14] Since the Court of Appeals has not ordered the unscrambling of the lease—and in fact has repeatedly indicated that such a sanction will not be necessary[15]—the net effect is that Port Richmond will continue in control of Elevator B at least for the duration of the lease, and the union can-

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[13] SIU once asked the Fifth Circuit to modify the District Court's injunctions so as to allow the union "to take economic action against the lessor-appellee [Galveston] here *if*, and when, the parties have exhausted all of the statutory bargaining procedures . . ." (Brief before the Fifth Circuit dated September 6, 1966, p. 18).

[14] The Board also declined to accept certification of SIU as the bargaining unit, based upon a finding that its chief distinction would be one of separation based on race.

[15] 351 F. 2d at 191; 368 F. 2d at 413; App. C, E.

not picket Elevator B during this period. Under these circumstances, how could it possibly be said that an injunction against state action is necessary to "effectuate" any judgment which the District Court may now enter? Under the circumstances and the applicable law, there is neither a right to strike nor a federal court judgment to be effectuated by an injunction against state proceedings.

More importantly, for the federal courts to encourage strikes by holding that picketing is a *necessary* concomitant of their order to bargain is, we submit, not only erroneous but directly contrary to the national labor policy of discouraging work stoppages whenever possible. Nothing could so unsettle the balance of labor-management relations worked out by Congress than to hold, before bargaining even begins, that "The right to strike is adjunct to the Union's statutory rights and implicit in our order." 400 F.2d at 334; App. H.

It is one thing to hold, as this Court recently did in a 4-to-3 vote, that the ultimate right of the disputants to resort to self-help is implicit in the statutory scheme of the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 37 U.S.L.Week 4247 (March 25, 1969). It is quite another to make the right to strike part of a court order to bargain. The Court in *Jacksonville Terminal Co.* pointed out that it would be disruptive of the national labor policy to forbid a strike in all instances, since this would so vitally affect the bargaining process. But it is just as clear that a District Court order which obstensibly is directed solely to the bargaining process, but which

in fact carries with it a ruling on the union's right to strike after the bargaining is over, would be equally disruptive of the bargaining process. As the Court pointed out: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.' The Act provides a detailed framework to facilitate the voluntary settlement of major disputes." This can hardly be accomplished when the right to strike is incorporated into the District Court's bargaining order, since the bargaining has not been completed and, as this Court recognized in *Jacksonville Terminal Co.*, the union cannot strike in any and all circumstances, regardless of the facts.

There is, however, an even more important distinction between the situation in *Jacksonville Terminal Co.* and the one in the instant case. In that case, the Court repeatedly emphasized that all procedures required by the Railway Labor Act had been exhausted before there was any recourse to the federal or state courts and before any injunctions issued. For example, the Court said: "The events most pertinent to the present litigation began on April 24, 1966, when the Florida East Coast Railway Company (FEC), *having exhausted all procedures required by the Railway Labor Act* for the resolution of a 'major dispute,' unilaterally changed its operating employees' rates of pay,

rules, and working conditions" (37 U.S.L.Week at 4247; emphasis added; footnotes deleted).[16] As we have pointed out, that is not the situation here. The Railway Labor Act machinery has *not* been exhausted. We are not dealing with a present right to strike but rather with a present prohibition against striking, embodied within the federal law itself, for no one claims—not the union and not the courts below—that SIU can strike now, whether or not the state court injunction remains in effect. The imbalance in labor-management relations that would result from the type of order entered below can hardly be overstated. This could hardly have been the intent of Congress.[17]

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[16] The Court also said: "While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo* §§ 2 Seventh, 5 First, 6, 10" (37 U.S.L.Week at 4250); "However, we conclude that the least unsatisfactory one is to allow parties who have *unsuccessfully exhausted* the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law" (*id.* at 4254; emphasis added; footnote deleted).

[17] "The objection that the bill should in express terms forbid strikes during the period of the inquiry by the emergency board and for 30 days thereafter is successfully met, in the opinion of the committee, by the contention that in forbidding a change in the condition out of which a dispute arose, one of which and a very fundamental one is the relationship of the parties, it already forbids any interruption of commerce during the period referred to; and *if strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided.* S. Rept. No. 222, 69th Cong., 1st Sess. at 5 (emphasis added). This passage from the Senate Report was quoted in *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 566, fn. 3 (1930), in which case this Court also observed that "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Id.* at 565.

It is not only a matter of labor-management relations. Federal-state relations in this delicate area should not be further strained by forbidding state action based on an entire series of future contingencies, as the Court of Appeals did here.[18] And particularly they should not be strained by a separate court action and an injunction, rather than through the orderly process of appeal. If SIU believed that the state court encroached upon some federal right by restraining its picketing, the proper avenue of challenge was by appeal within the state courts, with ultimate recourse to this Court. "Nowhere has a Federal trial court been given supervisory or appellate jurisdiction over State judges". *Williamson* v. *Puerifoy,* 316 F.2d 774, 775 (5th Cir. 1963). The point is well made by *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra.* In that case the attack on the state court injunction was not made in an ancillary proceeding in the federal courts. Instead, the union took an appeal from the issuance of the state court injunction to the Florida District Court of Appeals and from there to the Supreme Court of Florida. It then sought certiorari in this Court. Thus, there was no occasion in that case to confront the proposition of whether the federal district courts, in an entirely different proceed-

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[18] The tenuous and illusory nature of any conflict between state and federal jurisdictions is illustrated by the Court of Appeals' statement that "The effect of the state court injunction against a *possible* Union strike is *perhaps* to render impotent the duty to bargain imposed by this Court." 400 F. 2d at 331; emphasis added; footnote deleted.

ing, can stay the use of what had separately been obtained from the state courts.[19]

The court's novel interpretation of § 2283 patently ignores the effect clearly intended by Congress and flatly contradicts the authority of past decisions. The final exception in the Act relating to the "effectuation" of judgments was added solely to authorize injunctions against relitigation in a state court of matters *previously* and fully adjudicated by the federal courts.

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[19] The Court of Appeals relied on *California* v. *Taylor*, 353 U.S. 553 (1957). But that case merely held that the Railway Labor Act applies to a state-owned belt railroad engaged in interstate commerce and supersedes provisions of state civil service laws which conflict with the Act. No one disputes that the Act applies in general to petitioner's business, although the grain elevators themselves do not relate to its carrier-type operation. However, it is a far different and quite erroneous position to assert that the applicability of the Railway Labor Act to a carrier owned by an arm of the State means that all power of the State to legislate in relation to such operation is thereby usurped, and even further that such usurpation gives federal courts the power to stay state court orders in ancillary proceedings.

Indeed, the Court in *California* v. *Taylor* implicitly recognized the validity of the California law prohibiting strikes by public employees, and, rather than overturning the law, indicated simply that its reduction of the possibility of work stoppage did not mean that the railroad was not also subject to the collective bargaining requirements of the Act:

> The fact that, under state law, the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's "reign of law" was established [353 U.S. at 566].

In fact, this Court has more recently held in a parallel decision that employees could bring a state action for breach of a collective bargaining contract, even though such conduct would constitute an unfair labor practice prohibited by § 8 of the NLRA. While federal law is directly applicable, the court's jurisdiction is not preempted. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

A simple reference to the Reviser's Notes demonstrates this:

> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., 62 S.Ct. 139, 314 U S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).
>
> Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.

Other courts have specifically recognized this restricted meaning.[20] The injunction issued by the District Court here is quite obviously not within the purview of this last exception for relitigation of matters already disposed of in the federal court, and, as previously stated, the court below conceded that it was not within the first two exceptions in § 2283.

Even if this Court were to decide that the Railway Labor Act in some way preempted the state law otherwise applicable to respondent or made a state court injunction inappropriate, the decision below is nonetheless erroneous and disruptive. Such a holding would not obviate the independent prohibition of § 2283.

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[20] *E.g., Allied Mutual Insurance Co.* v. *Roberson*, 306 F. 2d 130 (4th Cir. 1962); *International Ass'n of Machinists* v. *United Aircraft Corp.*, 333 F. 2d 367 (2d Cir. 1964), *cert. denied*, 379 U.S. 946 (1964).

Quite simply, this Court has established beyond question that the flat prohibition against federal court injunctions applies even when state courts are proceeding in an area preempted by federal legislation. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511 (1955).

The court below attempts to distinguish *Richman*. However, that case is directly in point. It held that under § 2283 the federal court had no power to enjoin state court proceedings initiated by an employer seeking an injunction against union picketing on the ground that such conduct violated state law. An allegation that the state court was "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress", was not within any exception to the prohibition against enjoining proceedings in state courts (348 U.S at 515).

If the decision below is not reversed, it will likewise stand in direct conflict with those of other circuits which have considered the question. *German* v. *So. Carolina State Ports Authority*, 295 F.2d 491 (4th Cir. 1961); *International Ass'n of Machinists* v. *United Aircraft Corp., supra*. In *German*, the South Carolina Ports Authority obtained an injunction against union picketing from a South Carolina court. The union then sought a federal injunction against use of the state injunction on the ground that the picketing was protected by the NLRA. The Court of Appeals held that even assuming the picketing was protected, the state court proceeding could not be enjoined.[21] In

[21] It added, in language particularly applicable here: "If the state court's restraining order is erroneous, relief may be sought through state channels, ultimately to the Supreme Court of the United States." 295 F. 2d at 495.

International Ass'n, the union sought a federal court injunction to prevent an employer from proceeding in the Connecticut courts with a suit for damages based on organizational activities which the union said were protected by § 7 of the NLRA. The Court of Appeals held that for a number of reasons the federal court could not issue such an injunction. One of these reasons was § 2283:

> There is nothing in the present case which would make that statute inapplicable. There is no express authorization by Act of Congress There is no jurisdiction in the district court which would be aided by an injunction. The district court has issued no judgments which require protection or effectuation [333 F.2d at 371].

Indeed, it is difficult to perceive why the court below erred this time when it had itself previously and correctly applied § 2283. After a careful and lengthy review of the case law, it barred an injunction against state proceedings "even when the subject matter of an action, as federal courts see it, rests exclusively in federal courts under a federal statute." *T. Smith & Son, Inc.* v. *Williams,* 275 F.2d 397, 407 (5th Cir. 1960).[22]

The court quite curiously and mistakenly relied in large part upon the earlier case of *Capital Service, Inc.*

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[22] The Fifth Circuit in that case properly recognized the controlling congressional limitation and the vital underlying bases for enactment of the statute:

> [T]he hands-off doctrine expressed in Section 2283 is to be considered in the light of the function of Section 2283 as a pillar of federalism. Like the doctrine of abstention, its "• • • justification • • • lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State" [275 F. 2d at 407].

v. *NLRB,* 347 U.S. 501 (1954). There, a manufacturer obtained an injunction against certain union conduct and filed an unfair labor practice charge with the NLRB against the union based on *precisely the same conduct.* This Court concluded, quite naturally, that since the NLRB had exclusive jurisdiction, the state court injunction and the exercise of authority by the NLRB were in direct conflict.[23] No such situation exists here.

Finally, even if an injunction were authorized in this case by an exception to § 2283, it would still have been necessary for the respondent to establish in a hearing in the District Court that an equitable basis existed for such remedy. As pointed out in *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163 (1943), the courts "should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." No such finding, or even an allegation thereof, was asserted or recognized by the courts below. *No hearing for the taking of testimony has ever been held in this case.* Surely, on the limited facts of the case developed to date, no such finding could be made.

Moreover, if equity rests with either party, it surely favors petitioner. No real injury to the respondent arises if it must refrain from picketing until the validity of the state's prohibition is resolved and the bar-

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[23] Similarly, the case of *NLRB* v. *Schertzer,* 360 F. 2d 152 (2nd Cir. 1966) cited by the court, involved an injunction of state garnishment proceedings, sought by the *Board,* and deemed peculiarly necessary to avoid possible ministerial burdens in supervising compliance with its orders involving backpay.

gaining, if there is to be such, has terminated. On the other hand, how can the petitioners, or their successor, be restored for injury to their business by the action of the respondent, when the basis for the injunction against picketing is ultimately upheld?[24] The court below says that the effect of the state's injunction is "perhaps to render impotent" the court-imposed duty to bargain (citing only the Norris-LaGuardia Act, which it previously had held inapplicable). 400 F.2d at 331. Aside from this being a fallacious conclusion in itself, the fact is that appropriate and sufficient sanctions exist under the Act and under the contempt power of the federal courts to deal with any violations of court orders relating to the bargaining process.

In conclusion, the injunction issued in this case flatly violates the congressional prohibition embodied in § 2283. Clearly, none of the exceptions permitting such injunctions is applicable. If this decision is not reversed, new and irreparable harm will be done to the concept of federalism and the balance of power between the federal and state judiciaries.

B. The Grant of Backpay Without Recourse to Administrative Agencies Violates the Controlling Federal Statute and Conflicts With Decisions of This Court and Other Circuits.

For the first time in the 42-year history of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, a federal court

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[24] The impact upon the public caused by such a strike would be even more serious. The Galveston papers estimated that the loss to the economy of Galveston from the port strike in January-March, 1965, was $100,000 a day. *Galveston Daily News,* January 26, 1965; *Galveston News-Tribune,* February 16, 1965, p. 4. One study indicated that 70 percent of the Island's economy was linked to the Port, and 54 percent of its population was supported directly or indirectly by the Port. *Galveston Daily News,* July 17, 1968, p. 4.

has ordered the award of backpay to employees, under the Act, without any prior determination of any kind by any administrative board or agency.

The holding below is unique in the history of the federal court system and in the development of the field of administrative law. As the Court of Appeals conceded, "Admittedly, no case has been found where a federal court has awarded backpay as part of its enforcement of the status quo in a major dispute." 400 F.2d at 327.[25] Yet that is precisely what the court did in this case. Its ruling not only lacks support in prior case law but directly thwarts the intent of Congress expressed in the Act. If allowed to stand, it will wreck havoc in the railway labor field and, just as importantly, in all of the other administrative fields where backpay awards have heretofore been made by appropriate statutory agencies.

The decision will result in repeated conflicts between the federal courts and administrative agencies over which tribunal has jurisdiction to grant backpay in a given dispute. It will result in double standards as to backpay awards, and forum-shopping by litigants. It will take backpay decisions away from those agencies with experience and expertise in awarding them,[26] and place them in courts ill-equipped to handle them. As

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[25] See also n. 7, *supra*.

[26] There are innumerable ways in which the agencies have had to call upon this expertise in the field of backpay. For example, the NLRB for fifteen years calculated backpay on the basis of the entire period between discharge and an offer of reinstatement. However, as this Court quoted the Board in *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953), " 'The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act.' " Therefore, the method of calculation was changed. This

the Court of Appeals recognized in this very case, it will even result in the appointment of special masters to decide the intricate and multitudinous problems inherent in backpay awards.[27] The use of such special masters, adding new burdens to an already overburdened federal judiciary, is wholly unnecessary in light of the administrative decisional structure already in existence and specially designed by Congress for just this type of case.[28] Citing a lack of "expertise and competence," this Court refused in *Jacksonville Terminal Co., supra*, to allow federal courts to decide issues for which they are "institutionally unsuited" (37 U.S. L.Week at 4254).

The NLRA requires collective bargaining with respect to rates of pay, wages, hours and other conditions of employment, and with respect to questions arising under existing agreements. The Railway Labor Act,

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Court refused to disturb the change, pointing out that "as is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . .'; and they are none the worse for it." *Id.* at 348.

[27] SIU told the Court of Appeals in one of its briefs: "The [District] Court's confusion as to the method for computation of backpay, *although understandable*, should certainly not pose an insuperable obstacle" (Brief of Appellant-Appellee dated September 1967 in No. 25081, p. 14; emphasis added).

[28] The court cannot avoid this decisional structure by resort to a master. As the Second Circuit said in *NLRB* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (2d Cir. 1943): "We start with the premise that Sec. 10(c) makes the fixing of back pay a part of that 'affirmative relief' which is confided solely to the Board; so that no court should assume the duty, whether directly or through a master; we have as little power over it as over 'equivalent employment.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 * * *." See also *NLRB* v. *Wentworth Bus Lines*, 191 F. 2d 849 (1st Cir. 1951).

on the other hand, forbids a change in the agreement itself with respect to pay, rules and working conditions without compliance with the notice and bargaining procedures of § 6. See 45 U.S.C. § 152, Seventh. Proposals of such changes may give rise to "major" disputes. On the other hand, issues regarding the meaning of existing agreements or their application to particular fact situations constitute only "minor" disputes to which the requirements of § 6 are inapplicable. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Beeler* v. *Chicago R. I. & P. Ry.*, 169 F.2d 557 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949). As this Court pointed out in *Jacksonville Terminal*, § 6 of the Railway Labor Act was amended by Congress specifically for the purpose of confining the Act's prohibitions to changes *in agreements*.

Furthermore, as pointed out in *Pitney*, "Not only has Congress then designated an agency peculiarly competent to handle the basic question here involved, but it also intended to leave a minimum responsibility to the courts." 326 U.S. at 566. Aside from ordering the parties to resort to administrative procedures when appropriate, the role of a federal court is limited to review or enforcement proceedings if and when a decision by the adjustment or mediation boards are later challenged or ignored by the parties. 45 U.S.C. § 153, First (p) and (q).

In awarding backpay without resort to an administrative tribunal, the opinion below conflicts with decisions of this Court, of other circuits and of the Fifth Circuit as well.

Citing three decisions of this Court, the Seventh Circuit has specifically held that "the district courts of the United States have no jurisdiction in an action to restore a discharged railway employee to his position, or to award him back wages because of his alleged wrongful discharge." *Buster* v. *Chicago, M., St. P. & P. R.R.*, 195 F.2d 73, 74 (7th Cir. 1952).[29]

In *Hilbert* v. *Pennsylvania R.R.*, 298 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961) the railroad closed its terminal in one city, making it necessary for engineers located there to be reassigned to another city if they continued such employment. The railroad contended that its authority unilaterally to terminate that operation was not abrogated by the existing agreement. The Court of Appeals recognized the presence of a minor dispute subject to administrative remedies and affirmed the District Court's refusal to grant an injunction against the railroad's action. The court held that the union's previously-issued § 6 notice did not convert the dispute into a major one, even though the revisions sought by the union might involve some of the same proposals involved in the minor dispute.

In *Rutland Ry.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), the carrier had at

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[29] See also *Walker* v. *Southern Ry.*, 385 U.S. 196 (1966); *Roberts* v. *Thompson*, 107 F. Supp. 775, 776 (E.D. Ark. 1952). Similarly, numerous cases hold that the District Courts have no jurisdiction under the Railway Labor Act to award damages for wrongful discharge. *Buster* v. *Chicago, M., St. P. & P. R.R.*, 195 F. 2d 73 (7th Cir. 1952); *Barnhart* v. *Western Maryland Ry.*, 128 F. 2d 709 (4th Cir. 1942); *Hayes* v. *Union Pacific R.R.*, 184 F. 2d 337 (9th Cir. 1950); *United R.R. Operating Crafts* v. *Northern Pacific Ry.*, 208 F. 2d 135 (9th Cir. 1953), *cert. denied*, 347 U.S. 929 (1954); *Hettenbaugh* v. *Air Line Pilots Ass'n*, 189 F. 2d 319 (5th Cir. 1951); *Roberts* v. *Thompson*, *supra*.

first proposed under § 6 to change any portions of the existing agreement which might prevent it from consolidating, altering or abolishing terminals and runs. However, concerned during the delay about the rising unprofitability of several freight runs and concluding that it would be acting within its rights under the existing agreement anyway, it unilaterally abolished several freight runs. The court held this to give rise to a minor dispute (regardless of the previous notice about the possible changes), observing:

> [W]e should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties. If this is a minor dispute, a decision on the merits of the dispute is the function of the National Railroad Adjustment Board; and if this is a major dispute the outcome of the parties' difference is to be determined by extra-judicial forces and procedures [307 F.2d at 33].

In *Hudson & Manhattan R.R.*, 172 F.Supp. 329 (S.D.N.Y.), *aff'd per curiam sub nom. Stichman* v. *General Grievance Comm.*, 267 F.2d 941 (2d Cir. 1959), *cert. denied*, 363 U.S. 843 (1960), the layoff of unneeded employees following acquisition of new equipment, asserted to be within the carrier's general rights not abrogated by the existing agreement, created a minor dispute; a strike by the union, not the layoff, was enjoined.[30]

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[30] See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958), where the railroad established a new yard at which crews would be required to report for duty. The Fourth Circuit found a minor dispute as to whether the action was within management's prerogative under existing agreements and held the matter subject to final determination by the adjustment board. (Cont.)

The action of the court below also conflicts with its own disposition of other cases. Directly in point in facts as well as applicable law is *Brotherhood of Locomotive Engineers* v. *Central of Georgia Ry.*, 341 F.2d 213 (5th Cir.), *cert. denied,* 382 U.S. 841 (1965). Following ICC approval of the sale of Central's stock to Southern Railway, Central gave notice to its employees that it no longer needed their services due to the resultant consolidation of operations. The court, holding that the dispute was a minor one, stated:

> [I]t does not follow that every time a carrier takes unilateral action that may affect "rates of pay, rules or working conditions" then Section 6 must be invoked on the theory that the carrier is thus intending to effect a "change in agreements affecting rates of pay, rules or working conditions" which the parties here both agree can be accomplished only in the manner provided under Section 6 of the Act. The Central of Georgia Railway does not purport to and has not suggested an intention to make a "change in the *agreements* affecting rates of pay, rules or working conditions" [341 F.2d at 216; emphasis by the court].

The court in that case relied on its earlier decision of similar effect in *St. Louis, S.F. & T. Ry.* v. *Railroad Yardmasters,* 328 F.2d 749 (5th Cir. 1964), where the railroad's plan to abolish some yardmaster positions was viewed as producing a minor dispute depending upon the construction of its rights under the exist-

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Similarly, the general abolition of positions which are no longer either necessary or economically useful do not constitute changes *in agreements* affecting working conditions but at the most give rise to minor disputes regarding the carrier's right to take such action under existing agreements. *Nunn* v. *Missouri Pac. R.R.,* 248 F. Supp. 304 (E.D. Mo. 1966); *Pennsylvania R.R.* v. *Local 2013, Railroad Workers,* 178 F. Supp. 53 (E.D. Pa. 1959).

ing contract. In reversing the decision below, the Fifth Circuit observed that the union and District Court had "fallen into the error of assuming that whenever an issue arises between the carrier and the Union relating to 'rates of pay, rules, or working conditions' then Section 6 must be invoked" (id. at 753).[31]

The Court of Appeals in the instant case thus made a series of mistakes in reaching it erroneous result:

1. The original and basic error was in designating this as a major dispute.

In *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, 723 (1945), this Court described major disputes as those

> * * * over the formation of collective agreements or efforts to secure them. They arise when *there is no such agreement or where it is sought to change the terms of one,* and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights claimed to have vested in the past [emphasis added].

Congress thus gave the National Railroad Adjustment Board (or system boards of adjustment specially created to bear the same responsibilities) exclusive jurisdiction to interpret and apply the terms of *existing* collective bargaining agreements in resolving disputes arising thereunder when submitted by either party.

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[31] It has consistently been held that "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process." *Beeler* v. *Chicago, R.I. & P. Ry.,* 169 F. 2d 557, 560 (10th Cir. 1948), *cert. denied,* 335 U.S. 903 (1949).

No one, including SIU, questions that if this is a minor dispute, the statutorily-established adjustment board has primary exclusive jurisdiction. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946). Nor does anyone question that, as the Court of Appeals said, the dispute is a minor one if the Agreement, "by its terms [or] reasonable implication therefrom, * * * *apparently* affords *some arguable basis*" for the employer's action (351 F.2d at 188; emphasis added). The sole issue, then, is whether the Agreement in this case apparently afforded such an arguable basis for Galveston's action. Clearly it did.

As pointed out in our Statement, one article in the Agreement, carefully complied with by Galveston, provided for seven days' notice before employees were "laid off." The Court of Appeals concluded that Galveston's action "was not, and cannot even remotely be justified as a 'lay off' * * *" (351 F.2d at 189). Yet the SIU itself has repeatedly, from the very inception of this case, called Galveston's action a "lay off" or "laying off,"[32] and surely common understanding of this term would encompass this meaning. But if there is some question in this connection, its resolution falls precisely wtihin the statutory responsibility of the Adjustment Board, whose members "understand the railroad problems and speak the raliroad jargon." *Slocum* v. *Delaware, L. W. R.R.*, 339 U.S. 239, 243

[32] Telegram to W. H. Sandberg, Galveston Wharves Board of Trustees, dated August 1, 1964; Telegram to James Balthrop, Port Richmond Elevator Co., dated August 1, 1964; Telegram to Bunge Grain Corp., dated August 1, 1964; Telegram to Mr. Sandberg, dated August 19, 1964; SIU picket signs July 31–October 4, 1964 (see *United Industrial Workers, supra*); Brief before the Fifth Circuit dated November 1967, p. 24.

(1950). See also *Switchmen's Union* v. *Southern Pacific Co.,* 398 F.2d 443 (9th Cir. 1968).

Moreover, while the Court of Appeals at one point stated that Galveston went out of business, at another point in the same opinion it held that Galveston did not go out of business (*supra,* n. 4). And finally, the holding of the Court of Appeals that Galveston terminated its Agreement during the term of the Agreement (351 F.2d at 189) flies in the face of the NLRB's finding that on August 13, 1964, SIU "requested opening of the contract *which it claimed was in force* since it considered Port Richmond as a successor" (*United Industrial Workers, supra;* emphasis added). The point is not which answers to these issues were correct but rather that the issues should have been resolved in the first instance by an administrative tribunal instead of a court, for clearly there was an arguable basis for treating Galveston's action as a layoff covered by the Agreement.

Another article in the Agreement reserved broad management rights to Galveston. Such a management rights clause has been held to waive a union's right to bargain over an employer's good faith decision to close a plant. *Ador Corp.,* 150 N.L.R.B. 1658 (1965); *Druwhit Metal Products Co.,* 153 N.L.R.B. 346 (1965). See also *NLRB* v. *Adams Dairy Inc.,* 350 F.2d 108 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966); *General Motors Corp.,* 149 N.L.R.B. 396 (1964). Certainly the article provided, at the very least, an arguable basis for Galveston's action. This being so, the dispute was a minor one.

2. Even if the Court of Appeals was correct in finding that the basic dispute is a major one, it does not

follow that the dispute over backpay is also major. The District Court pointed out in its opinion of June 20, 1966 (App. D):

> The moving force behind the action herein taken is the finding by the Court of Appeals that the dispute over the leasing of the elevator is major rather than minor within the meaning of the Railway Labor Act. However, a portion of the relief sought by plaintiff relates to benefits and wages due under the contract. This Court is, of course, without jurisdiction to determine what wages and other benefits have accrued under the terms of the Labor Agreement herein found to have remained in force until September 30, 1964. * * * The amount of wages and benefits due must be resolved by interpretation of the existing contract. This is a "minor dispute" which ultimately must be referred to and determined by the Railroad Adjustment Board, if not disposed of by agreement. * * *

3. Even if the Court of Appeals correctly held that the backpay issue is a major dispute, the court nevertheless reached the wrong result. For as Judge Bell pointed out in dissent to the court's original opinion, the *Darlington* case[33] holds that an employer has the right to close a part of its business so long as there is no showing of an anti-union purpose (351 F.2d at 193). Even the majority of the court conceded that no such anti-union purpose was involved in this case (351 F.2d at 184).

4. Even if the District Court had jurisdiction to grant backpay, it clearly should have declined to do

[33] *Textile Workers of America* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

so under the doctrine of primary jurisdiction. As the District Court pointed out in its opinion of May 3, 1967 (App. G): "This doctrine, as defined in *U. S.* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963), requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."

5. Finally, no award should have been ordered in this case without affording Galveston a fair and complete hearing on the facts. Not a word of oral testimony has ever been taken. Galveston has repeatedly attempted, without success, to introduce evidence as to industry practices, the financial condition of the Elevator B operation, and many other matters.

The Court of Appeals treated the issue of backpay as a relatively simple one, with "sufficient guidelines" already marked out "to chart our course in these waters." 400 F.2d at 327. The District Court took a different view. In its opinion of May 3, 1967 (App. G), the District Court found that problems relating to backpay "brought to the Court's attention by both parties" would "require research into entirely unfamiliar fields." The fact is that this is an extraordinarily complex area. A few of the many problems that could arise in this very case are these:

(1) There is the issue as to whether and to what extent the affected employees have sought other employment. "[A] substantial number of Awards of this Board have firmly established the rule that a Claimant is obligated to mitigate alleged damage by seeking and accepting comparable employment to which entitled by his seniority" (National Railroad Adjust-

ment Board (NRAB) Award 14588, March 10, 1967). As pointed out in our Statement, Port Richmond specifically invited SIU members to apply for work, only one man applied, and he was hired. It may be that the members already had other jobs.[34] Regardless of what the situation is, it must be determined by the appropriate tribunal, because a failure to attempt to obtain suitable employment definitely should result in deductions from backpay.[35]

(2) Backpay must be limited to the expiration date of the contract. *NLRB* v. *George E. Light Boat Storage, Inc.*, 373 F.2d 762 (5th Cir. 1967). A substantial question exists as to whether and when the contract expired.

(3) There will be questions as to whether the employees have been drawing compensation from the Railroad Retirement Board. See NRAB First Division Award 19 208, S, T v. CRI&P; NRAB First Division Award 19 545, T v. CNO&TP.

(4) The Agreement with the SIU guaranteed a forty-hour week but not overtime. If the employees received backpay based on average gross earnings received over the last six months, they would receive payment for overtime work never performed and not guaranteed by the Agreement.

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[34] The union stated in a brief to the Fifth Circuit that if the employees were rehired, "they would have to give up jobs procured in the interim * * *" (Brief dated September 1967, p. 9).

[35] *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 199-200 (1941); *NLRB* v. *Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957); *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680, 683-684 (5th Cir. 1959).

(5) There undoubtedly would be questions about retired employees—questions which the Court of Appeals left open.

(6) The court also noted but did not resolve questions relating to employee contributions to the Seafarers Welfare Plan.

(7) There will be issues over those employees, if any, who have died since August 1, 1964.

(8) What will be the situation in regard to new employees who were hired before August 1, 1964, but after or during the six-month period for calculating average earnings?

(9) The Railroad Adjustment Board does not allow interest on backpay. See NRAB First Division Award 12 476, T v. TRRA of STL. On NLRB awards, some Courts of Appeals have allowed interest and some have not. Obviously, this will be an issue that must be resolved.

But these are just the beginning. Myriad other questions arise in cases before appropriate administrative tribunals. Some of the many problems are illustrated by labor decisions mentioned in the footnote.[36]

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[36] (1) In discrimination cases, backpay has been denied to those union members who, although discriminatorily laid off, would have been laid off for economic reasons even if no discrimination had been practiced. *NLRB* v. *Carolina Mills, Inc.*, 190 F. 2d 675 (4th Cir. 1951).

(2) A backpay order for employees discriminatorily discharged has been held to amount to no more than would equalize earnings with other employees. They should not be awarded for time that the plant was standing idle. *NLRB* v. *Stilley Plywood Co.*, 199 F. 2d 319 (4th Cir. 1952).

(3) There are problems relating to the date of an offer of reinstatement, which must be found in order to determine the termina-

Surely there is no basis for suddenly casting on the federal courts this new burden of resolving these many and varied questions in the first instance. Indeed,

tion of the liability period. *Nashville Corp.*, 94 N.L.R.B. 1567 (1951).

(4) There is no liability for backpay during a period while employees would have been out on strike anyway. *United States Cold Storage Corp.*, 96 N.L.R.B. 1108 (1951).

(5) Backpay may be based on the earnings of another comparable unskilled laborer when employment is not fixed, on the assumption that the claimant would have the same opportunities for work at the same wages. *Pugh and Barr, Inc.*, 102 N.L.R.B. 562 (1953), *aff'd*, 231 F.-2d 558 (4th Cir. 1956).

(6) The fact that the length of work-weeks will frequently vary must be taken into account. *Deena Artware, Inc.*, 112 N.L.R.B. 371 (1955).

(7) Backpay may be denied for failure of an employee to cooperate in determining the amount due or for lack of evidence regarding interim earnings. *Efco Mfg., Inc.*, 111 N.L.R.B. 1032 (1955).

(8) Two or more employees may be jointly and severally liable for backpay. *Norma Mining Corp.*, 101 N.L.R.B. 944 (1952).

(9) Actual physical inability to work during the period may reduce backpay accordingly. NRAB First Division Award 18526, F. v. MSTP&SSM; *Pacific American Shipowners Ass'n*, 98 N.L.R.B. 582 (1952).

(10) Backpay may include an increase for a promotion which the employee would have received. *Underwood Machinery Co.*, 95 N.L.R.B. 1386 (1951).

(11) Expenses for moving to another location where reinstatement is offered have been allowed. *Symns Grocer Co.*, 109 N.L.R.B. 346 (1954).

(12) A customary allowance for quarters and meals has sometimes been included. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(13) Questions often arise as to vacation pay during the period in question. *Moss Planing Mill Co.*, 110 N.L.R.B. 933 (1954). See also NRAB First Division Award 19 964, T. v. StL-SF.

(14) Questions relating to Workmen's Compensation benefits and health and welfare benefits must be considered. *NLRB* v.

there is every reason to leave them to the bodies created by Congress for this purpose.

The Court of Appeals has ordered "sanctions" against Galveston, and yet it was SIU that—after meeting with Galveston on several occasions about the layoffs, agreeing to arbitrate its grievance, and designating

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Moss Planing Mill, 224 F. 2d 702 (4th Cir. 1955); NRAB Interpretation No. 1 to Fourth Division Award 2034.

(15) Travel expenses for interim employment in excess of travel costs to the employer's plant have on occasion been included. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(16) Sometimes questions arise as to Christmas gifts to employees during the period at issue. *Moss Planing Mill Co.*, 110 N.L.R.B. 933 (1954).

(17) Insurance benefits have been held to go to the estate of a deceased employee. *Dayton Coal & Iron Corp.*, 101 N.L.R.B. 672 (1952).

(18) Veterans' on-job subsistence pay received while an employee was out has been deducted from backpay. *Somerville Cream Co.*, 106 N.L.R.B. 1155 (1953).

(19) Issues have arisen as to whether union dues over what would normally have been paid should be disallowed. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(20) There may have to be an exclusion for the estimated effect that a seasonal shortage of work would have had on the backpay of an employee. *NLRB* v. *Sterling Furniture Co.*, 227 F. 2d 521 (9th Cir. 1955).

(21) Medical maternity benefits payable under group insurance may or may not be awarded to backpay claimants who bore children during the period. *Deena Artware, Inc.*, 112 N.L.R.B. 371 (1955).

(22) Similar questions arise as to other medical and hospital expenses, group insurance and life insurance. NRAB Second Division Award 3883; NRAB Second Division Award 4793; NRAB Second Division Award 4866.

(23) Issues arise as to the deduction of taxes. See NRAB First Division Award 19 208, T. v. CRI&P.

its representatives to the System Board of Adjustment—then ceased prosecuting its claim and called a strike. No one has ever alleged that Galveston has not acted in good faith or that it has reflected any anti-union animus in leasing an unnecessary and economically-unsound portion of its business, dealing with SIU according to its rights as it saw them. Even if this were an appropriate case for sanctions, which we deny, the Act itself provides the correct sanction by making a "willful failure or refusal" to comply with the court's demands a misdemeanor punishable by fine or imprisonment. 45 U.S.C. § 152, tenth. The federal courts, in a proceeding to enforce a proper order of the Adjustment Board, also has at its disposal all of the sanctions for contempt of its directions. Here, no determination of the respective rights of the parties has been made; no "sanction" could possibly be viewed as appropriate.

The assumption is not that the court must be allowed to act in these circumstances. On the contrary, unless the Act explicitly allows a judicial remedy, "the assumption must be that Congress fashioned a remedy available only in other tribunals." *General Committee of Adjustments* v. *Missouri-K-T R.R.*, 320 U.S. 323, 337 (1943).

The respondent union, conceding that it could find no statutory or decisional authority to support its request for judicial relief, was quite frankly asking the Fifth Circuit to fashion an entirely new remedy under the Railway Labor Act. The Fifth Circuit complied. We submit that there is no basis in law or in public policy for adding another handicap to the effective functioning of the federal judiciary by depriving it of the benefit of initial (and probably final) resolution

of these problems by responsible administrative bodies. This Court must establish once and for all that primary and exclusive jurisdiction conferred by the Congress is not to be disregarded.

CONCLUSION

The Fifth Circuit in this case has taken two unprecedented steps, one of which will have an important and adverse impact upon federal-state relations and the other of which will have a similar impact upon relations between the federal judiciary and congressionally-created administrative tribunals. Both steps result in conflicts between circuits. We respectfully suggest that this Court, not the Fifth Circuit, should finally rule on two such important innovations in the law. And we respectfully urge that the decision below be reversed.

Respectfully submitted,

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